

SENATE BILL NO. 421

INTRODUCED BY V. JACKSON

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING ADVERSE EFFECT IN WATER LAW; PROVIDING THAT A NET DEPLETION OF A WATER SOURCE DOES NOT NECESSARILY MEAN THE WATER RIGHT OF A SENIOR APPROPRIATOR IS ADVERSELY AFFECTED; DECLARING THAT A NEW APPROPRIATION OF WATER UNDER A CERTAIN AMOUNT CANNOT ADVERSELY AFFECT POWER GENERATION WATER RIGHTS; AND AMENDING SECTION 85-2-311, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) A permit may be issued under this part prior to the adjudication of existing water rights in a source of supply. In a permit proceeding under this part, there is no presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication of existing water rights pursuant to this chapter. In making a determination under this section, the department may not alter the terms and conditions of an existing water right or an issued certificate, permit, or state water reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. ~~In this subsection (1)(b), adverse~~ Adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. In this subsection:

(i) the net depletion of a water source does not necessarily mean there is an adverse effect; and

(ii) power generation water rights cannot be adversely affected if the total of the power generation water rights exceeds the flow of the stream or river on which the power generation facility is located and an application for a permit is less than 0.001% of the total of the power generation water rights;.

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

(3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

1 (a) the criteria in subsection (1) are met;

2 (b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the
3 following:

4 (i) the existing demands on the state water supply, as well as projected demands, such as reservations
5 of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum
6 streamflows for the protection of existing water rights and aquatic life;

7 (ii) the benefits to the applicant and the state;

8 (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

9 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been
10 made;

11 (v) the effects on private property rights by any creation of or contribution to saline seep; and

12 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined
13 by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

14 (4) (a) The state of Montana has long recognized the importance of conserving its public waters and the
15 necessity to maintain adequate water supplies for the state's water requirements, including requirements for
16 federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in
17 trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes
18 that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
19 with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (4) must be
20 met before out-of-state use may occur.

21 (b) The department may not issue a permit for the appropriation of water for withdrawal and
22 transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

23 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
24 subsection (1) or (3) are met;

25 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

26 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens
27 of Montana.

28 (c) In determining whether the applicant has proved by clear and convincing evidence that the
29 requirements of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department shall consider the following factors:

30 (i) whether there are present or projected water shortages within the state of Montana;

1 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water
2 shortages within the state of Montana;

3 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
4 use the water; and

5 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
6 water.

7 (d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the
8 applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and
9 use of water.

10 (5) Subject to 85-2-360, to meet the preponderance of evidence standard in this section, the applicant,
11 in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit
12 hydrologic or other evidence, including but not limited to water supply data, field reports, and other information
13 developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources
14 conservation service and other specific field studies.

15 (6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,
16 impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or
17 employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation,
18 diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally
19 or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or
20 control waters within the boundaries of this state except in accordance with this section.

21 (7) The department may adopt rules to implement the provisions of this section.

22 (8) For an application for ground water in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341,
23 85-2-343, or 85-2-344 or during the period of closure for any basin that is administratively closed pursuant to
24 85-2-319, the applicant shall comply with the provisions of 85-2-360 in addition to the requirements of this
25 section."

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